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IN THE
COURT OF APPEALS OF INDIANA

JAMES HOWARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0609-CR-494
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G17-0605-FD-86695

June 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

James Howard pled guilty to Domestic Battery,[1] a class D felony, and was sentenced to three years, with one year executed, two years suspended, and one year on probation. Howard challenges his sentence, presenting the following consolidated, restated issues for review:

1. Did the trial court err in sentencing Howard by considering prior arrests that did not result in convictions?

2. Was Howard's sentence inappropriate?

We affirm.

On May 18, 2006, the State charged Howard with two counts of domestic battery, one as a class A misdemeanor and one as a class D felony, and two counts of battery, one as a class A misdemeanor and one as a class D felony. On July 28, 2006, Howard entered into a plea agreement whereby he agreed to plead guilty to domestic battery as a class D felony in exchange for the State's agreement to drop the remaining three charges. Also, the parties agreed that the sentence would be open to argument, but executed time would be capped at two years. The trial court took the plea under advisement and set sentencing for August 10, 2006.

During the factual basis phase of the August 10 sentencing hearing, Howard admitted that on May 6, 2006, he and his wife, Donna, "got into a fight" over car keys. *Transcript* at 11. At some point, Howard angrily grabbed Donna by the arm and threw her onto the bed, causing Donna to suffer pain and bruising.

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[1] Ind. Code Ann. § 35-42-2-1.3 (West, PREMISE through 2006 Second Regular Session).

After the parties presented arguments concerning the appropriate sentence, the court sentenced Howard to three years, with one year executed, two years suspended, and one year of probation. In pronouncing sentence, the court specifically noted Howard's history of substance abuse and domestic violence, characterizing Howard's history of abusing Donna as "phenomenal." *Id*. at 24.

1.

Howard contends the trial court erred, when determining an appropriate sentence, in considering prior arrests not reduced to convictions, in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). It is well established that sentencing decisions lie within the trial court's sound discretion. *Williams v. State*, 861 N.E.2d 714 (Ind. Ct. App. 2007). Those decisions are given great deference on appeal and will be reversed only for an abuse of discretion. *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007).

We note first that *Blakely* does not apply to sentences for offenses committed after the effective date of Indiana's new advisory sentencing scheme, or April 25, 2005. *See Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*. Therefore, *Blakely* may not be invoked and this claim implicates only the propriety of relying upon arrests not reduced to convictions as valid aggravating circumstances.

As noted in *McDonald v. State*, 861 N.E.2d 1255 (Ind. Ct. App. 2007), *trans. pending*, this Court is currently divided on the question of whether, in light of recent amendments to our sentencing statutes, we should review aggravators and mitigators found by the trial court. Under our new advisory sentencing scheme, a court may impose

any sentence authorized by statute "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code Ann. § 35-38-1-7.1(d) (West, PREMISE through 2006 2nd Regular Session). Although our Supreme Court has not yet interpreted this statute, its plain language indicates that a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances. *McDonald v. State,* 861 N.E.2d 1255. Accordingly, until our Supreme Court indicates it is not good law, we follow *McDonald* and conclude that a challenge to the trial court's sentencing statement presents no issue for appellate review when the sentence is authorized by statute.

Howard pled guilty to class D felony domestic battery. "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years." Ind. Code Ann. § 35-50-2-7 (West, PREMISE through 2006 2nd Regular Session). The trial court sentenced Howard to three years on the residential entry conviction and suspended one year, with an additional year suspended to probation. Therefore, Howard's sentence for domestic battery was authorized by statute, and the trial court could not have abused its discretion by imposing it.

2.

Howard contends his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character

of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

On appeal, Howard contends his enhanced sentence is inappropriate for three reasons, one of which, i.e., a claimed violation of *Blakely* by considering arrests not reduced to conviction, we have already rejected. The first of the other two is "[a] three year sentence for simply pushing someone onto a bed and bruising an arm by grabbing that person is inappropriate in light of the offense." *Appellant's Brief* at 8. This description of the incident discounts the effect on the victim, who was handled with such force that it caused bruising and stomach pain, even though she was thrown down upon a relatively soft surface. Moreover, this was by no means the first time Howard battered his wife. Rather, it was the latest in what the trial court described as a "phenomenal" series of physically abusive episodes. *Transcript* at 10. The nature of the offense did not preclude the imposition of an enhanced sentence.

Second, Howard claims his sentence was inappropriate in light of his character. Howard's entire argument in support of this claim consists of the following: "Howard maintains that the trial court's [sic] abused its discretion when it failed consider [sic] the [sic] Howard's guilty plea as a mitigating factor." *Appellant's Appendix* at 8. We take

this to represent a claim that Howard's acceptance of responsibility through his guilty plea evinces strength of character that the trial court failed to credit as a mitigating factor.

It is well established that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. *See Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). Although a trial court should make some acknowledgment of a guilty plea when sentencing a defendant, the mitigating weight of that guilty plea will vary from case to case. *See Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). It has often been observed, "a plea is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d at 525; *see also Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*. In this case, Howard clearly received a tangible benefit in return for his guilty plea in that his executed sentence was capped at two years. Under these circumstances, the guilty plea did not reflect a quality of character that renders Howard's sentence inappropriate. The trial court did not err in sentencing Howard.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.